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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1117

ISABEL CARMEN SAURI TYRELL ET AL., *Petitioners*

v.

SUPERIOR COURT OF PUERTO RICO, PONCE PART,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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Counsel for Petitioners

March 14, 1966

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

ISABEL CARMEN SAURI TYRELL, and others similarly situated, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Puerto Rico entered on October 15, 1965, denying petitioners' petition for a writ of certiorari to review the judgment of the Superior Court of Puerto Rico, Ponce Part, entered on December 14, 1964.

OPINIONS BELOW

The judgment of the Superior Court of Puerto Rico (R. 93), which represents the effective determination of the merits here, is unreported and is printed in Appendix A hereto, page 1a, *infra*. The judgment of

the Supreme Court of Puerto Rico (denying petitioners' petition for certiorari to review the aforesaid judgment of the Superior Court) is unreported and is printed in Appendix B hereto, p. 15a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Puerto Rico sought to be reviewed was entered October 15, 1965. An extension of time until March 14, 1966, was granted by Mr. Justice Fortas for filing petition for certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. section 1258(3).

QUESTION PRESENTED

The sole question presented is whether the Puerto Rican courts have accomplished a manifest injustice by means of a misconstruction of a procedural rule which is substantially identical to Rule 60 of the Federal Rules of Civil Procedure, adopted by this Court, and the construction of which purports to follow the construction of said Rule 60 of the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

28 U. S. C. section 1258

> "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> . . .
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States."

Rule 49.2, Rules of Civil Procedure for the General Court of Justice of Puerto Rico:

> "Mistakes; Inadvertence; Surprise; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. * * * The motion shall be made within a reasonable period, and in any case not more than six months after the judgment, order, or proceeding was entered or taken." Rules of Civil Procedure for the General Court of Justice of Puerto Rico (1958), 9 Laws of Puerto Rico anno. (1964 Supp.).

STATEMENT

The decision of the Superior Court of Puerto Rico which the Supreme Court of Puerto Rico has refused to review represents the latest culmination of a long and bitter litigation involving the claims—hitherto successful—of an alleged illegitimate and unacknowledged child in the line of inheritance to a Puerto Rican family fortune. This Court has previously denied certiorari on another phase of this litigation, *Luis J. Nicole et al.* v. *Mercedes Ortiz Berdecia et al.*, No. 244, October Term 1964, certiorari denied October 11, 1965. The questions on the merits involve Puerto Rican and Spanish laws of inheritance which this Court may feel should be peculiarly within the cognizance of the courts of Puerto Rico. These petitioners do not, therefore, seek to present such questions to this Court. They seek only to present the question of the construction by the Puerto Rican courts of a procedural rule which is

modelled after Rule 60 of the Federal Rules of Civil Procedure, and where that construction has apparently contributed materially to the refusal of the Puerto Rican courts to reconsider a decision which petitioners consider accomplishes a manifest injustice.

The rule in question is Rule 49.2 of the rules governing the Superior Court of Puerto Rico. This rule is set out, in relevant part, at page 3, *supra*. Paragraphs (1) and (6) of this rule were invoked by petitioners in an effort to obtain a reconsideration on the merits by the Superior Court. This effort was rejected by that Court on the ground, primarily, that it had no power to reconsider under Rule 49.2, unless the rule was invoked *within the time allowed for a direct appeal.* (R. 173).

The point here relied upon was presented to the Supreme Court of Puerto Rico in petitioners' petition for review, paragraph 3(a), (R. 2).

REASONS FOR GRANTING THE WRIT

1. The Puerto Rican Rule 49.2 is substantially identical to Rule 60(b) of the Federal Rules of Civil Procedure. As pointed out by the Superior Court, the Puerto Rican rule in effect originally (Rule 60(b) also) "was amended when it was incorporated as Rule 49 of 1958, following the amendment which had been made to the federal rules in 1946." (R. 172). The Island policy of following the federal rules is apparent. It is in the interest of orderly development of the Island rules that their construction be uniform with that of the federal rules.

The situation in this respect is similar to that prevailing in Guam. With respect to the Guam rules, (which are also modelled after the Federal Rules of

Civil Procedure) the Court of Appeals for the Ninth Circuit has said:

> "Guam Rule 60(b) was prescribed by the Judicial Council of Guam on December 15, 1954, pursuant to the authority vested in it by Section 123 of the Guam Code of Civil Procedure. This and many other rules so prescribed are almost identical with their counterparts by the same number in the Federal Rules of Civil Procedure. This indicates to us that, to the extent that uniformity of rule-language was attained, the Judicial Council intended uniformity of construction. It follows that Guam Rule 60(b) carries the statutory gloss of federal Rule 60(b), rather than that of the statutes of Guam referred to above." *Corn* v. *Guam Coral Company*, 318 F. 2d 622, 631.

2. Rule 60(b), F.R.C.P., and Puerto Rican Rule 49.2 both permit a motion to set aside a judgment to be brought within a "reasonable time". There is no basis in the history of the rule (see Moore's Federal Practice, Civil Rules and Official Forms, 1963, p. 1035 et seq.) for an arbitrary and *a priori* determination that "reasonable time" means in any and all cases "appeal time", i.e., the time within which a direct appeal could have been taken. It is true that Moore expresses a contrary view:

> "By analogy to the time limitation upon the bill of review for error of law, and in the interest of finality of judgments, a reasonable time should not exceed the time allowed for appeal from the judgment. So limited, a motion for relief under 60(b)(1) does not unduly affect the sound principle of finality, nor the general principle that 60(b) is not a substitute for appeal. At the same time it infuses needed flexibility into our procedure, and allows the district court to correct judicial errors that must otherwise be corrected by

appeal." Rule 60(b)(1) par. 60.22[3] Moore's Federal Practice, 2nd Ed. Vol. 7, page 238.

Moore's opinion in this regard is not only illogical in the light of the history of the rule and particularly the 1946 amendments, but it is inconsistent with his own statements. In the paragraphs preceding, in his treatise, Moore points out that the amended rule is intended to be broader and more flexible, in the interest of fundamental justice, than the old bill of review (which was limited to error apparent on the record). Thus, what possible reason would there be to arbitrarily delimit the operation of a "reasonable time", by "analogy to the time limitation upon the bill of review."? Similarly, what possible justification would there be to so delimit "reasonable time" by the "interest of finality of judgments", when the very purpose of Rule 60, and particularly of the 1946 amendments, was to *avoid* an absolute "finality of judgments", in proper cases?

3. The Superior Court, after holding that petitioners' motion was too late, purported to go and decide it anyway (R. 174). But it is quite apparent, we submit, that although well-intentioned this was a gesture, and that the decision was really rested on the court's interpretation of a "reasonable time".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

March 14, 1966

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APPENDIX A

IN THE SUPERIOR COURT OF PUERTO RICO
PONCE PART

Civil case TS-52-114

Filiation, Absolute Testamentary Nullity, etc.
(Heirs of Rafael Sauri)

MERCEDES SAURI BERDECIA, substituted by her sole heirs, minors FRANCISCO and BENEDICTA ROSARIO SAURI, represented by their father, FRANCISCO ROSARIO, *Plaintiffs*

v.

ISABEL CARMEN SAURI TYRELL, *et al.*, *Defendants*

Civil case CS-63-1694

Absolute Nullity of Testamentary Institution, etc.
(Heirs of Elizabeth Tyrell)

Incident: Motion for Summary Judgment

MERCEDES SAURI BERDECIA, substituted by her sole heirs, minors FRANCISCO and BENEDICTA ROSARIO SAURI, represented by their father, FRANCISCO ROSARIO, *Plaintiffs*

v.

ISABEL CARMEN SAURI TYRELL, *et al.*, *Defendants*

• • • • • • • • • • •

Order

I

ANTECEDENTS

On January 7, 1964 plaintiff—Mercedes Sauri Berdecia—filed a motion for summary judgment with respect to the first cause of action in case CS-63-1694 and attached an identical motion as to the second cause of action in case TW-52-114. The court set February 7, 1964 for the hearing and argument of these motions.

On January 16, 1964 the defendants requested a term of 30 days to answer the motions for summary judgment which was granted by this Court, and the hearing set for February 7 was postponed. The term of thirty days having expired without the defendants having filed the answer which they had announced, the court set February 28 to hear the motions for summary judgment. At the request of the defendants the hearing was continued for Thursday, March 12, 1964. Again at the request of the defendants the hearing of March 12 was suspended, and April 6, 1964 was set anew.

On April 3, 1964 the parties—by motion—submitted the incident of summary judgment to the consideration of the court, and the latter granted a term of thirty days counted from April 6, to file their briefs.

On May 4, 1964 the defendants filed a motion for extension to file their brief and on the fifth day of the same month the plaintiffs also requested an extension. These extensions were granted until June 5, 1964, the plaintiffs having filed a lengthy and elaborate brief within the term of the extension.

The defendants failed to file their brief within the term of the extension as well as within an additional term of five months within which the court took judgment under advisement with respect to the motions for summary judgment, waiting for defendant's brief.

On December 14, 1964—almost a year after the motions for summary judgment were filed—this court entered judgment granting the same stating in full in our opinion the juridical grounds on which we based our judgment.

The defendants did not file any motion for reconsideration of the aforesaid judgment.

On January 18, 1965, the defendants filed in the Supreme Court a petition for review of our judgment of December 14, 1964 (R-65-16). This petition for review was denied by the Supreme Court for lack of jurisdiction on February 8, 1965. On March 9, 1965 the defendants filed a certiorari proceeding C-65-24 in the Supreme Court, alleging that said Court should exercise its discretion, in furtherance of justice, to review by way of certiorari the merits of our judgment of December 14, 1964, citing several precedents under which the defendants believed that said certiorari proceeding was proper when the petition for review had been denied and stating at length the reasons of law why they believed that their judgment should be reversed.

The Supreme Court denied the petition for certiorari. The mandates in the petition for review and in the certiorari proceeding were timely sent to this Court.

The issue thus joined, the defendants filed on April 6, 1965 a motion requesting Court to set aside its judgment of December 14, 1964, which was heard and amply argued on January 1, 1965. That motion is now before our consideration.

II

LACK OF JURISDICTION FROM A PROCEDURAL POINT OF VIEW

In support of their motion the defendants invoke the provisions of Rule 49.2. Even though they invoked in said motion paragraphs 5 and 6 of said Rule, at the hearing they amended their motion and invoked paragraphs 1 and

6. A study of the motion shows that the grounds adduced to set aside our judgment consist of several errors of law which the defendants believe were committed in rendering the judgment. These grounds were traditionally the proper ones for filing a motion for reconsideration within the term of fifteen days fixed by the Rules for said motion. Under Rule 60(b) in force until 1958, a motion to set aside a judgment could not be filed on the grounds stated in the case at bar. *Banco Popular* v. *Superior Court,* 82 P.R.R. 236 (1961).

However, our Rule 60 was amended when it was incorporated as Rule 49 of 1958, following the amendment which had been made to the federal rules in 1946. In the case of *Banco Popular* v. *Superior Court, supra,* the Supreme Court in a footnote which appears at pages 244 and 245 of volume 82, states "by way of illustration" that after 1958 the situation would present the following picture:

> *"Moore asks himself if this extension of Rule 60(b)(1) authorizes relief from a substantive error of law by the court, and he is inclined to believe that the answer is in the affirmative, although he admits that the matter is not free from doubt and that there are contrary authorities, as in effect it is so.* The text writer observes that Rule 60(b) by express provision does not affect the finality of a judgment, nor does it suspend its effects, and hence, does not operate directly to toll the time for appeal; and that if the rule is construed to authorize a motion for relief from a judgment because of judicial error, then an appeal will subsequently lie from a final decision on the motion, and appeal time will have been indirectly extended. *He believes, nevertheless, that* relief can be given under Rule 60(b)(1) *as long as the motion is presented within a reasonable time. . . . Moore concludes that a reasonable time in such a case should not exceed the time allowed for appeal. In this manner, the text writer observes, neither*

is the principle of finality affected, nor would the relief operate as a substitute for appeal." 82 P.R.R. pp. 245 and 246 (footnote 5).

In view of the foregoing, under the grounds of the motion before our consideration—alleged errors of substantive law—the court believes that it could have only granted the remedy sought if the motion to set aside the judgment had been filed within the term of thirty days after judgment was rendered. As a question of fact, the motion was filed almost three months after the term had expired.

Inasmuch as the reasons or grounds adduced herein to set aside our judgment are reasons which should properly fall within subdivision one of Rule 49.2—which as we have seen now permits the granting of a remedy against the judgment based on a substantive error of the court—it is not possible to invoke these same reasons to seek the same remedy under subdivision 6 of Rule 49.2, inasmuch as said subdivision 6 refers to "any other reason" excluding therefore the reasons contained in subdivisions 1, 2, 3, 4, and 5 of the Rule, among them being the reason adduced by the defendants. To this effect see the cases of *Federal Deposit Insurance Corp.* v. *Alker,* 30 F.R.D. 527 (1962); *Davis* v. *Wadsworth Co.*, 27 F.R.D. 1 (1961).

III

THE MOTION IS DIRECTED TO THE DISCRETION OF THE COURT

Irrespective of our previous determination and inasmuch as we had the opportunity to take cognizance of the motion presented before our consideration, and we likewise had the benefit of the ample arguments of the parties, we believe that in order to decide the question raised before us, we should also consider this motion assuming that we had jurisdiction to take cognizance thereof.

Apart from the intrinsic merits that the motion might have under Rule 49, that is, apart from the solidarity with

which it invokes, the reasons given in said rule as acceptable to set aside a judgment, said motion is directed to the sound discretion of the court. Moore says the following:

> "If the district court has power to grant relief, then its determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted; *the matter, then, is largely within the judicial discretion of the trial court.*"

To the same effect see the case of *Iturriaga* v. *Fernandez*, 78 P.R.R. 29 (1955), and 3 Barron 395.

In determining whether or not we should exercise our discretion in favor of the defendants to grant them the remedy sought, if the petition had merit, we cannot overlook the fact that this is a case the antecedents of which go back to 1935; that its present phase commenced in 1952; that the defendants have been generous in the use of all the remedies provided by law to attack the resolutions which have been unfavorable to them, all of which remedies have invariably been decided against them; and that the grounds which they now adduce to set aside our judgment are production quasi verbatim of the allegations made against said judgment in Certiorari C-65-24 before the Supreme Court with negative results.

Nor can we overlook the fact that the Supreme Court has labeled the actions of Mercedes Berdecia a continuous "judicial peregrination" and it has said "this litigation has been going on for 10 years and it is for the best interest of all parties concerned that it be definitively decided as soon as possible." (Opinion of January 25, 1963 in Certiorari C-26-21). Likewise, this Court must also state that the defendants never filed an answer to the motion for summary judgment nor a memorandum stating their points of view for the benefit of the court. That even after judg-

ment was rendered against them, they failed to file a motion for reconsideration and that this Court learned of defendants' points of view for the first time on April 6, 1965, when they filed the motion to set aside the judgment. That is, one year and three months after the motion for summary judgment had been filed.

All these considerations lead us to the conclusion that even if we had authority in law to grant the remedy sought, we would not exercise our discretion in favor of the defendants because, to say the least, there are no factors or facts that will prompt us to do so.

IV

INTRINSICALLY THE MOTION HAS NO MERITS

But irrespective of any consideration as to the jurisdiction or judicial discretion, the motion presented lacks sufficient merit in itself to warrant the remedy sought.

The first argument of law presented by the defendants consists in a citation from volume 5 of Manresa at p. 336, 6th edition, which argues the possible existence in Spain of the legacy of an aliquot part. As to the consideration of this juridical figure within the Puerto Rican order, that stage of the proceedings which consists in indicating the observations made by Manresa Scaevola has already been overcome. In our judgment of December 14 at pages 24-28 we gave ample consideration to this problem as the same has been raised in our case law. The leading case in this matter is *Vivaldi* v. *Registrar*, opinion of November 30, 1962 (Blanco Lugo), which establishes in plain words the rule that shall serve as our guidepost to determine the effect of certain testamentary dispositions such as the ones made in this case.

We again wish to point out that the wills in question did not establish the specific and particular property that cor-

responded to the grandaughters Isabel Marie Nicole Sauri and Eugenie Lois Nicole Sauri. The word legacy was not used at all. The words used were: *that the free third should correspond to these granddaughters.* So that we find it proper to apply the doctrine to the effect that "when a designation is made of an aliquot part, whichever formula is employed by the testator, and although he might have used the word legacy in disposing of an abstract portion, of an ideal unit—independently of its material context—the testator has revealed that his intention was to transfer a universality, to make a transfer by universal title, and consequently, to designate an heir." *Vivaldi* v. *Registrar, supra.*

Therefore, we reiterate our original determination that both grandaughters, Isabel Marie and Eugenie Lois Nicole Sauri, were designated by their maternal grandparents as heirs and they should be considered in such capacity in order to determine the effect that the omission of Mercedes Sauri Berdecia might have as to them.

In view of this situation the defendants state on page 5 of their motion that "the essential" point that they wish to raise is that even assuming that they be considered as voluntary heirs and not as legatees, the effect of the omission "is limited to annul that part of the will which refers to the forced legal portion, but has no effect in annulling the free third."

In support of this theory they cite certain paragraphs from volume 6 of Manresa at pp. 428, 429 and 430, in which the commentator argues the effects of the omission from the will. In citing these paragraphs separately and outside of the context of the argument of Manresa, they seem to support defendants' theory. However, an examination of the argument of the effects of the omission appearing in Manresa's work at pages 428-434, shows us that the opinion of the commentator and of the Spanish authorities

is entirely contrary to what these citations might indicate outside of their contexts.

In the first place, we note that the defendants cite the first paragraph of the argument beginning with the heading "Effects of Omission" to the words "forced heirs" at the end of that paragraph at page 429. Immediately following Manresa says: "Is this the spirit of the law?" Let us see what he decides. This statement which follows the first paragraph of the discussion shows that that paragraph consists in setting forth the question to be argued and that it does not express the opinion of the commentator, as might be assumed when it is cited separately.

Immediately Manresa begins to distinguish between the effects of an omission of the spouse and an omission of any other forced heir. Afterwards he discusses the effects of the omission as they are established in Section 814 of the Spanish Civil Code, which is equivalent to § 742 of the P.R. Civil Code, distinguishing the effects of the disinheritance made without a statement of the cause governed by Section 851 of the Spanish Civil Code, equivalent to Section 776 of our Civil Code. These sections read as follows:

"Section 742: Effect of omission of lawful heirs.

"The omission of any or of all the lawful heirs in the right line whether they be living at the time of the execution of the will or whether they are born after the death of the testator *shall annul the institution of an heir, but trusts and advantages or extra portions shall be valid whenever they are not inofficious.*"

"Omission of surviving spouse. "The omission of the surviving husband or wife does not annul the nomination of the heir, but the omitted party shall preserve the rights which this Code gives to him. If the omitted lawful heir shall die before the testator, the nomination of an heir shall have effect." (Section 814, Spanish.)

"Section 776: Effect of Disinheritance without Statement of Reason for.

"Disinheritance made without a statement of the reason, or for a reason the trust of which, if contradicted, should not be proven or which should not be one of those mentioned in the four following sections, shall annul the designation of heirship *in so far as it prejudices the person disinherited, but the legacies, advantages or extra portions, and other testamentary provisions, in so far as they do not prejudice said legal portion, shall be valid.*" (Section 851, Spanish.)

It is in order to distinguish between the effects of the omission and the disinheritance without cause that Manresa makes the commentary on page 430 cited by the defendants on page 6 of their motion. It is there that we find the following statement on which the defendants lay stress: "When disinherited or omitted, the free third does not correspond to him when the testator leaves it to another." If this statement is read within the context of what was previously said and of the following statement, it will be seen that what Manresa meant to set forth is that the free third does not correspond to the person omitted when the testator leaves it to another *as a legacy.* Therefore, we shall proceed to cite the previous and subsequent paragraphs in order that the scope of Manresa's commentary may be plainly understood.

"When the legal portion is not usufructuary, as happens in other cases, the omission necessarily alters essentially the designation of heirs. Such designation should be annulled wholly or partly, that is, only insofar as it prejudices the right of the omitted heir? Section 814 chooses the first solution, since we must strictly adhere to the text of the law, while Section 851 in analogous cases chooses the second solution.

"In effect, *the disinheritance without just cause* does not operate to disinherit, the heir retains his right to the legal portion; but only to the legal portion. The legacies, the extra portions, if any, and even the designation of heirship, are valid insofar as they do not prejudice the forced heir.

"The difference may be perfectly illustrated by an example. A bachelor, without legitimate descendants or ascendants, executes his will designating as his heir a remote relative. He later acknowledges a natural son or marries and has descendants, and dies without modifying his testamentary will. At his death the natural sons or the legitimate children, relying on the absolute nullity of the designation of heirs pursuant to Section 814, ask for the inheritance. In the case of Section 851 they could only ask for the legitimate portion. *When omitted, they acquire the right to everything;* disinherited, they are only entitled to one third or two thirds, as the case may be.

At the bottom, the question is identical. The testator may always dispose at his discretion of the free third. The legitimate heir, against the express will of the testator, is only entitled to his legal portion. Whether omitted or disinherited without just cause, the legal portion is his. Whether disinherited or omitted, the free third does not correspond to him, when the testator leaves it to another.

"Logically, it is not proper that the legitimate heir, in case of omission, should receive all the property when the testator has disposed of them under title of inheritance, and not when he has disposed of the *free third under title of legacy.*

"What is the reason for this difference? As a general rule the provision may be based on the presump-

tive will of the testator. . . ." 6 Manresa at pp. 429, 430.

On the following page, that is, on page 431, Manresa after stating certain points and making the distinctions made by him at page 428, begins to state the opinion of other authorities as to said points and then states his own.

As to the first, he states thus:

"*The authorities had not yet decided this question at the time the first edition of this work was published, because it had not been presented in the proposed terms although they already revealed their opinion. Today the question is already settled.*

"*We have cited the decisions of the Directorate of October 30, 1896 and May 20, 1898. In the first decision the question is boldly decided pursuant to the express text of Section 814. The designation of heirship is absolutely annulled and the intestate succession is opened for the entire inheritance. In the second, the question is avoided on the ground of secondary circumstances. In the following section we shall examine the decision of January 16, 1896.*" 6 Manresa 431.

As to his own opinion he states it as follows:

"The interpretation which directly flows from Section 814 is that the dispositions made under title of legacy or extra portion are the only ones which are valid, provided they are not inofficious. *As to the designation of heirship, it is annulled. Whatever is annulled becomes nonexistent, in whole or in part? No limitation is added, as in Section 851,* which states that the designation of heirship shall be annulled insofar as it prejudices the legal portion of the disinherited. It should be understood, therefore, that the annulment is complete or total, and that this section, as special in

the case in which it arises, prevails over Section 817." 6 Manresa 431, 432.

On pages 432-433 Manresa adds the following:

> "After the third edition of this work was published, the judgments of June 17, 1908 and February 27, 1909 were rendered, and the doctrine contained therein *cannot be more conclusive not only as to the full annulment of the testamentary designation,* but also as to the application of Section 814 to the acknowledged natural children."

It is crystal clear, after a full examination of the arguments set forth by Manresa concerning the effects of the omission from the will, that said omission produces the complete nullity of the designation of heirs, as to the two thirds of the legal portion as well as to the free third.

Notwithstanding the foregoing, in the event of the omission, of a forced heir and while the testator might have disposed under title of legacy of property which might have fallen within the free third, the nullity of the designation of heirs would not reach these testamentary dispositions by express provision of Section 742, which establishes that: ". . . but trusts and advantages of extra portions shall be valid when they are not inofficious." In the event that the legacies should exceed the free third they would have to be reduced insofar as they prejudice the legal portion of the omitted heir, but they would have full force and effect insofar as they had room within the free third.

The citation copied by the defendants from page 7 of Scaevola, corroborates these averments and it is in this sense that the same should be understood without giving to it the scope of supporting defendants' allegations.

As we stated in our judgment of December 14, 1964, our Supreme Court expressly and conclusively declared in

Cortés v. *Cortés,* 73 P.R.R. 643 (1952); *Semidey* v. *Viqueira,* 53 P.R.R. 445 (1938), and in *Heirs of Garrastazu* v. *Registrar,* 36 P.R.R. 157 (1927), that the omission in a will of a forced heir in direct line produces the nullity of the designation of heirship and the omitted heir is entitled to his share in the *entire estate.* As long as our highest court does not change this doctrine or the Legislature does not alter or modify Section 742 of the Civil Code, whenever a case of omission is involved as in the case at bar, the entire nullity of the designation of heirship is the only juridical solution to the problem.

With respect to the nullity of the extra portion in favor of Isabel Sauri Tyrell, the defendants have been very brief in their arguments against the ruling of our judgment of December 14, 1964 and in that respect we say that we reaffirm our position sustained therein by reproducing herein all the arguments and authorities wihch led us to our conclusions.

By virtue of the foregoing the motion to set aside the judgment filed by the defendants on April 6, 1965 is hereby dismissed.

Let it be notified.

Ponce, P. R., July 6, 1965.

(s) Armindo Cadilla Ginorio
Superior Judge

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

Filiation, Absolute Nullity of Designation of Heirship, etc.

MERCEDES SAURI BERDECIA formerly, now her children FRANCISCO AND BENEDICTA ROSARIO SAURI, represented by their father FRANCISCO ROSARIO, *Plaintiffs*

v.

ISABEL CARMEN SAURI TYRELL, *et al.*, *Defendants*

* * * * * * * * * * *

Division composed of Mr. Justice Pérez Pimentel, as Chief Judge of Division, Mr. Justice Blanco Lugo, Mr. Justice Rigau, and Mr. Justice Davila.

Order

San Juan, Puerto Rico, October 15, 1965.

The petition for certiorari filed August 3, 1965 is hereby denied.

It was so agreed by the Court as witnesses the signature of the Chief Justice.

(s) LUIS NEGRON FERNANDEZ
Chief Justice

I attest:
(s) IGNACIO RIVERA
Secretary